KPMG Consulting (ASPAC) Sdn Bhd v YB Menteri Sumber Manusia Malaysia & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R1–25–35 OF 2000

RAUS J

8 AUGUST 2003

Labour Law — Employment — Reference of dispute over dismissal to Industrial Court by Minister — Applicant claimed it was wrongly named when Minister made reference — Applicant applied for certiorari — Whether application could be granted

This is an application by the applicant for an order of certiorari to quash the decision of the Honourable Minister of Human Resource ('the Minister') dated 15 March 2000 for referring the representation of the third respondent under s 20 of the Industrial Relations Act 1967 ('the Act') to the second respondent ('the Industrial Court'). The applicant also sought a prohibition order against the Industrial Court from hearing the said representation. The third respondent had joined the Melbourne Practice of KPMG Australia and was then seconded to Kuala Lumpur for a period of three years. Two years later the third respondent was told his contract had expired and was offered a new post in Melbourne. The third respondent claimed that the secondment was for three years and made a representation to the Industrial Relations Department. In the conciliation meeting, the applicant stated that the third respondent was in fact the employee of KPMG Administration (Vic) Pty Ltd. The third respondent claimed that he was the applicant's employee during the secondment in Malaysia. The Director General of Industrial Relations then referred the matter to the Minister who made a reference of the third respondent's representation to the Industrial Court. The applicant claimed that it had been wrongly named as a party when the Minister made the reference.

Held, dismissing the applicant's application with costs**:**

The power of the Minister whether or not to make reference to the Industrial Court is provided by s 20(3) of the Act. Section 20(3) of the Act confers wide power to the Minister in exercising his discretion to refer or not, a workman's representation of dismissal without just cause and excuse to the Industrial Court. After a close scrutiny of this application and from submissions by parties, the court was of the view that the Minister had taken into account a relevant consideration and had exercised his discretion with the aims, objective and policy envisaged in s 20(3) of the Act, and that the third respondent's representation involved serious questions of fact and law and required the need to be ventilated and adjudicated before the Industrial Court. The Minister in reaching his decision, did not commit any error which would have warranted interference by way of judicial review (see paras 8, 10, 12).

[Bahasa Malaysia summary

Ini merupakan permohonan oleh pemohon untuk satu perintah certiorari untuk membatalkan keputusan Menteri Sumber Manusia ('Menteri') yang bertarikh 15 Mac 2000 yang telah merujuk representasi responden ketiga di bawah s 20 Akta Perhubungan Perusahaan 1967 ('Akta itu') kepada responden kedua (Mahkamah Perusahaan). Pemohon juga memohon satu perintah larangan terhadap Mahkamah Perusahaan daripada mendengar representasi itu. Responden ketiga telah bekerja dengan Amalan Melbourne KPMG Australia dan telah dipinjamkan ke Kuala Lumpur selama tiga tahun. Dua tahun kemudian, responden ketiga telah diberitahu bahawa perjanjiannya telah luput dan telah ditawar jawatan baru di Melbourne. Responden ketiga telah menyatakan bahawa pinjaman itu adalah selama tiga tahun dan telah membuat representasi kepada Bahagian Perhubungan Perusahaan. Di dalam mesyuarat pendamaian, pemohon menyatakan bahawa responden ketiga merupakan pekerja KPMG Administration (Vic) Pty Ltd. Responden ketiga pula berkata bahawa beliau merupakan pekerja pemohon semasa dipinjamkan ke Malaysia. Ketua Pengarah Perhubungan Perusahaan telah merujuk perkara ini kepada Menteri yang telah membuat rujukan representasi responden ketiga kepada Mahkamah Perusahaan. Pemohon telah menyatakan bahawa ia telah dijadikan pihak secara salah apabila Menteri membuat rujukan beliau.

Diputuskan, menolak permohonan pemohon dengan kos:

Kuasa Menteri sama ada untuk membuat rujukan kepada Mahkamah Perusahaan telah diperuntukkan oleh s 20(3) Akta itu. Seksyen 20(3) Akta itu memberi kuasa yang luas kepada Menteri itu untuk menggunakan budibicara beliau untuk merujuk representasi pemecatan tanpa alasan yang adil seseorang pekerja kepada Mahkamah Perusahaan. Setelah menjalankan pemeriksaan teliti permohonan ini, mahkamah berpendapat bahawa Menteri itu telah menimbangkan pertimbangan yang relevan dan telah menggunakan budibicara beliau dengan matlamat-matlamat, objektif dan polisi yang dibayangkan oleh s 20(3) Akta itu, dan bahawa representasi responden ketiga mengenai persoalan-persoalan fakta dan undang-undang adalah serius dan yang perlu dibentangkan dan dibicarakan di Mahkamah Perusahaan. Menteri itu, di dalam membuat keputusan beliau tidak melakukan kekhilafan yang mungkin menyebabkan campur tangan melalui penyemakan penghakiman (lihat perenggan-perenggan 8, 10, 12).]

Notes

For cases on references of disputes over dismissals to Industrial Court by Minister, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue) para 937.

Legislation referred to

Industrial Relations Act 1967 s 20(1),(3)

Gan Khong Aik (Lee Hishammuddin) for the applicant.
Ishak bin Bakri (Senior Federal Counsel, Jabatan Peguam Negara) for the first respondent.
Anand Ponnudurai (Bodipalar Ponnudurai Nathan) for the third respondent.

Raus J:

[1] This is an application by the applicant for an order of certiorari to quash the decision of the first respondent, the Honourable Minister of Human Resource ('the Minister') dated 15 March 2000 for referring the representation of the third respondent under s 20 of the Industrial Relations Act 1967 ('the Act') to the second respondent ('Industrial Court'). The applicant is also seeking for a prohibition order against the Industrial Court from hearing the said representation.

[2] The relevant facts giving rise to this application are the following: the third respondent had joined the Melbourne Practice of KPMG Australia ('KPMG Australia') in 1995 and was a KPMG Administration (Vic) Pty Ltd employee. On or somewhere in August 1997, the third respondent was then seconded to Kuala Lumpur by holding the post as the director of the said applicant company. The secondment was to be enforced on 15 August 1997 for a term of three years with the option to extend the said term with the consent of both parties. The third respondent accepted the offer of the said secondment. Subsequently, the third respondent was informed that his secondment had expired on 19 September 1999 that is after two years of secondment, and he was offered a new post by KPMG Administration (Vic) Pty Ltd in Melbourne. At the outset, it is pertinent to note that the above-mentioned facts had been agreed by the involved parties and arising from this, the third respondent avers that the applicant had indeed agreed that the third respondent's secondment was in fact intended for a period of three years.

[3] The third respondent, however, was dissatisfied with the said termination and claimed that the third respondent's secondment had been agreed for a period of three years and thus, the termination was unlawful, unjust and premature. Due to this, the third respondent made a representation under s 20(1) of the Act to the Industrial Relations Department. A conciliation meeting was held, whereby the issue raised by the applicant in the meeting was that the applicant was never an employer of the third respondent thus, there was no issue between the applicant and the third respondent. The applicant avers that at all material time the KPMG Administration (Vic) Pty Ltd was the third respondent's employer.

[4] The third respondent nevertheless claimed that he was an employee of the applicant throughout his employment in Malaysia.

[5] In view of the dispute between the parties, the Director General of Industrial Relations referred the matter to the Minister whom then made a reference of the third respondent's representation to the Industrial Court under s 20(3) of the Act.

[6] It is against the Minister's decision which led to this application before this court by the applicant. The crux of the applicant's case was that the KPMG Australia was the third respondent's employer and not the applicant and as such, the applicant has been wrongfully named as a party. The applicant contended that the Minister had failed or omitted to take into account this important fact in exercising his discretion under s 20(3) of the Act in referring the representations of the third respondent to be adjudicated by the Industrial Court. The applicant further submitted that although the third respondent had served in Malaysia during the secondment period, KPMG (Vic) Pty Ltd was the employer to the third respondent since there was a contract entered between the KPMG (Vic) Pty Ltd and the third respondent.

[7] The Minister in his affidavit affirmed on 21 February 2001 averred that the reference was made after having considered all the information brought before him in the representation, concerning the applicant's denial of being the third respondent's employer in which was contradictory to the third respondent's contention which was based on the second letter of offer throughout his employment in Malaysia that the applicant was his employer. Based on the facts before him, the Minister was satisfied that there were indeed serious questions of fact and law calling for adjudication by the Industrial Court. The issue was whether the applicant was the employer of the third respondent or otherwise. To the Minister, these are serious questions of fact and law which requires full investigation by the Industrial court, which is the body to whom the Parliament has vested the relevant adjudicatory power. Thus, the Minister claimed that he had rightfully exercised his discretion under s 20(3) of the Act to refer the matter to the Industrial Court.

[8] The power of the Minister whether or not to make reference to the Industrial Court is provided by s 20(3) of the Act which stated as follows:

> Upon receiving the notification of the Director General under subsection (2), the Minister may, if he thinks fit, refer the representations to the Court for an award.

[9] The word 'Minister may' as appears in s 20(3) of the Act had been judicially considered by the then Supreme Court, in the case of *Minister of Labour, Malaysia v Lie Seng Fatt* [1990] 2 MLJ 9 where at p 10 Hashim Yeop Sani CJ (Malaya) said:

> There is no question that the power of the minister under s 20(3) of the Act is wide and the language used by the legislature would seem to confer on the Minister a wide discretion whether to refer or not to refer a dispute to the Industrial Court depending on the facts of each case provided of course he has acted bone fide, that is without any improper motive, and he has not taken into account extraneous or irrelevant matters. He has an unfettered discretion but should not be exercised so as to frustrate the object of the statute itself.

[10] Clearly that s 20(3) of the Act, confers wide power to the Minister in exercising his discretion to refer or not, a workman's representation of dismissal without just cause and excuse to the Industrial Court.

[11] The function of the High Court, particularly in this type of application is well established. The High Court, when hearing judicial review of this nature is not sitting in its appellate jurisdiction, but in its supervisory jurisdiction and the court is more concerned with the decision making process and not the decision itself. In *Michael Lee Fook Wah v Minister of Human Resources Malaysia & Anor* [1988] 1 MLJ 305 at p 309, Shaik Daud JCA said as follows:

> First and foremost, it must be emphasized that in an application for certiorari, the High Court is not sitting in its appellate jurisdiction but in its supervisory jurisdiction. The court is more concerned with the decision-making process and not the decision itself. The court should not readily question the administrative decision of the first respondent as that is his absolute discretion. If the first respondent had acted ultra vires, unfairly or unjustly in exercising his discretion, then it is the duty of the courts to interfere in an application for review of that decision. The underlying principles of judicial review have been stated in a number of cases, and it is the exercise by those with whom discretionary power is vested, not in the courts, that the courts are required to review.

[12] Therefore, after a close scrutiny of this application and from submissions by parties, I am of the view that the Minister had taken into account a relevant consideration and had exercised his discretion with the aims, objective and policy envisaged in s 20(3) of the Act, and that the third respondent's representation involved serious questions of fact and law and required the need to be ventilated and adjudicated before the Industrial Court. To me, the Minister in reaching his decision, did not commit any error which would have warranted interference by way of judicial review.

[13] Accordingly, the applicants' application is hereby dismissed with costs.

Applicant'application dismissed with costs.

Reported by Chew Phye Ken